alternative avenues of communication and was therefore constitutional.

Five years later in *Barnes v. Glen Theater*, *supra*, this Court considered an Indiana statute which banned nudity in public places. In ruling that the statute was not unconstitutional, the Court applied the test set forth in *United States v. O'Brien*, *supra*. The Court found that the statute was a legitimate exercise of governmental power, furthered the substantial governmental interest of protecting a societal interest in order and morality and was narrowly tailored to serve that governmental interest. In fact, the Court stated: "Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the state's purpose."

In *City of Erie v. Pabst AM*, *supra*, this Court again had occasion to consider a statute banning nudity in public places, this time in Pennsylvania. In ruling that the statute was not unconstitutional, this Court again applied the test set forth in *O'Brien*. The Court ruled that the statute's purpose was to prevent or limit the harmful secondary effects of nude dancing and therefore served a substantial governmental interest. The Court further found that since the dancers were free to perform wearing pasties and G-strings, the effect on overall expression was de minimus. As a result, the ordinance was narrowly tailored and left open ample alternative means of communication.

In *Barnes*, the Court noted that the test set forth in *O'Brien* was essentially the same test which the Court used in *Renton v. Playtime Theaters, Inc.*, *supra*. In *City of Los Angeles v. Alameda Books*, *supra*, the Court again applied the same test to adult businesses. The Court found that an

ordinance which regulated the number of adult businesses in a building was aimed at the negative secondary effects of such business and therefore served a substantial governmental interest. Justice Kennedy, in his concurring opinion, agreed that the central holding of *Renton* is sound that a zoning resolution "designed to decrease secondary effects and not speech shall be subject to intermediate rather than strict scrutiny."

This Court has given ample guidance to federal courts in determining whether ordinances regulating adult businesses are constitutional. The reality of this case is that Union Township's resolution only regulates nude dancing and does not apply to dancing in G-strings and pasties similar to those ordinances in *Erie* and *Barnes*. Further, the ordinance allows adult cabarets with totally nude dancing to remain open from Noon to Midnight seven days each week. Restrictions on hours of operation have been upheld in *Richmond Book Mart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998), *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000); *Ben Rich Trading v. City of Vineland*, 126 F.3d 155 (3rd Cir. 1995); *DiMa v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady J Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995); *Mitchell v. Comm'n. on Adult Enter. Est. of the State of Delaware*, 10 F.3d 123 (3d Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986), and *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153 (9th Cir. 2003). In *Maricopa County*, the Ninth Circuit specifically rejected Justice Kennedy's proportionality analysis in *Alameda Books* noting that "because five members of the Supreme Court agreed that 'the central holding of *Renton* is sound' we applied the judicial three part test in order to determine the constitutionality of § 13-1422."

In deciding this case with reference to the hours of operation provision, the *en banc* Sixth Circuit cited the statement in *Maricopa County* that: "Six other circuits have had occasion to consider similar restrictions, and all have found such restrictions to be constitutional." Contrary to petitioner's argument, the circuit courts are not conflicted on this issue and have received ample guidance from this Court regarding the proper analysis of the hours of operation provision.

This Court has charged the judiciary with determining whether the ordinances are narrowly tailored. That is best done on a case by case basis. In this case, the plaintiff's dancers are permitted to dance 24 hours per day without restriction if they wear pasties and a G-string. If Deja Vu chooses to present totally nude dancing, then the dancers must comply with the minimal restrictions set forth in the resolution including the hours of operation provision. The resolution is narrowly tailored and the hours of operation provision leaves open ample channels of communication.

B. Petitioner does not have standing to attack the civil-disability provisions in the resolution.

In its decision, the Sixth Circuit properly concluded that Deja Vu does not have standing to attack the civil-disability provisions in the resolution. As amended, Resolution 00-22's civil-disability provisions do not apply to employees. Deja Vu has not applied for a permit to operate an adult cabaret and has not alleged that the person or entity applying for the permit is subject to any of the disability provisions. As the Sixth Circuit stated:

> To have constitutional standing necessary to maintain a lawsuit, "(1) a plaintiff must have

> suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be 'fairly traceable' to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury." *Deja Vu of Nashville, Inc.*, 274 F.3d at 389.

In *F/W PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), this Court found petitioner did not have standing to attack the civil-disability provisions in an adult entertainment ordinance even though the issue had not been raised by the parties. In so ruling, the Court stated that petitioners must allege facts essential to show jurisdiction and standing and that standing cannot be inferred from averments in the pleadings. No such allegations or proof have been presented in this case, and petitioner therefore does not have standing to attack the civil-disability provisions in the resolution.

The trial court applied the four part test in *O'Brien* to the civil-disability provisions and held they were not unconstitutional. Regardless, Union Township eliminated the requirement for the disclosure of the names of employees in the application and for the revocation of a license based upon prior criminal convictions of employees. Union Township eliminated those provisions even though the District Court ruled that there was a substantial likelihood that the provisions were constitutional. Union Township has no intention to re-enact those provisions and petitioner therefore lacks standing to challenge them.

C. Resolution 00-22 is not impermissibly vague.

This Court has adequately set forth the test to determine when a resolution is void for vagueness. In *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), this Court stated "an enactment is void for vagueness if its prohibitions are not clearly defined." The Sixth Circuit cited that language in ruling that Union Township's resolution was not vague. The terms attacked by petitioner such as "reasonable cause" and "adequate supervision" are terms which are commonly used in both legal and common language and are sufficiently clear so that a reasonable person can understand their meaning. It would be impossible to draft a resolution meeting the mathematical precision demanded by petitioner. The resolution is not impermissibly vague and it is not necessary for this Court to further define the standard by which such resolutions are judged for vagueness.

CONCLUSION

Based on the foregoing, Respondents, Union Township Board of Trustees, Kenneth Geis, in his official capacity as Administrator of Union Township, and the Union Township Police Department, respectfully request that the Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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No. 05-374

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In The
Supreme Court of the United States

DÉJÀ VU OF CINCINNATI, LLC,

Petitioner,

v.

UNION TOWNSHIP BOARD OF TRUSTEES; KENNETH GEIS; UNION TOWNSHIP POLICE DEPARTMENT; and JIM PETRO, ATTORNEY GENERAL OF THE STATE OF OHIO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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I. PETITIONER'S CHALLENGE TO THE CIVIL DISABILITY PROVISIONS WAS NOT RENDERED MOOT BY THE ENACTMENT OF THE MODIFICATIONS CONTAINED IN RESOLUTION 00-22.

In arguing that the modifications created by the enactment of Resolution No. 00-22 ("Res. 00-22") rendered Petitioner's challenges against the constitutionality of the civil disability provisions moot, the Union Township parties (sometimes collectively simply the "Township") in their Brief in Opposition ("Opposition") miss the most salient fact. The amendments to the civil disability provisions as contained in Res. 00-22 simply ***do not conform to the Ohio enabling statute***.

While Res. 00-22 engrafts a three year disability for violations under Ohio Revised Code Chapter 2907 (Res. 00-22(F)(2)(e) (Pet. App. 162)), the enabling law for this disability – found in Ohio Rev. Code § 503.55(C) (Pet. App. 129-130) – ***contains no such limitation***. In fact, that statute ***mandates*** that if a township has adopted a resolution under Ohio Rev. Code § 503.52 (as Union Township has obviously done here), the board of trustees "***shall deny*** any application for a permit to operate an adult cabaret or revoke a previously issued permit" if any person "named on the application ***has been convicted of or plead guilty to any violation of Chapter 2907 of the Revised Code***" or any substantially equivalent law of any state. Ohio Rev. Code § 503.55(C) (emphasis added). There is no time limit for the *statutory* disability. Thus, if the person has ***ever*** been convicted of such crimes, the board of trustees ***must*** deny the permit.

This means that the circumstances of John Doe II (the individual who owns more than 2% of the membership

interest in Déjà Vu of Cincinnati, LLC ("Deja Vu"), and who was convicted of obscenity-related charges in North Carolina in 1991) ***still*** disable the Petitioner from obtaining a permit under the enabling statute. While Res. 00-22 deleted the application disclosure of individuals owning 2% or more of the stock of a corporate applicant as was required in Res. 99-15(D)(5)(e) (Pet. App. 144-45), that provision ***too*** fails to conform to the enabling statute.

Ohio Rev. Code § 503.54 ***requires*** that an application for a permit to operate an adult cabaret (it "***shall*** include all of the following . . . " (emphasis added)) identify "any stock holder holding more than two percent of the stock of a corporate applicant. . . . "[1] Accordingly, John Doe II must be disclosed on the application pursuant to the statute, and he precludes Deja Vu from obtaining a permit under that same statutory scheme. And, Petitioner's complaint challenged the constitutionality not only of Res. 99-15, but of the enabling statute as well. *See*, ¶¶'s 15, 28, 30, 32-33, and 35 (Pet. App. 196-200).

The fact that the Township now professes to this Court that it has no intention of re-enacting the deleted provisions of the *Ordinance* (not that such a statement would be binding on the Township in the future anyway) is therefore beside the point, and is irrelevant to the standing issue.

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[1] Deja Vu is a limited liability company and not a corporation. If such an entity is considered a partnership – as opposed to a corporation – for purposes under the enabling statute and the Resolution, the outcome is the same because John Doe II would be considered to be a "partner" who would have to be disclosed on the application. Res. 00-22(D)(5)(d) (Pet. App. 159); and Ohio Rev. Code § 503.54(C) (Pet. App. 128-29). *See also* the discussion of John Doe II in n.2, *infra*.

Because the enactment of Res. 00-22 did not occur until the appeals to the Sixth Circuit had already been filed, and because the district court took no further action in this matter during the pendency of the appellate proceedings, Deja Vu did not have the opportunity to previously raise in the district court the invalidity of these provisions of Res. 00-22 in light of the limitations as are contained in the enabling statute.[2] Subsequent to the *en banc* ruling of the Sixth Circuit, however, the district court convened a scheduling conference, pursuant to which Deja Vu has filed – after the submission of the petition here – a motion to amend its original complaint to now be able to litigate its challenges to Res. 00-22. These new claims include the contention that the amendments created by the enactment of Res. 00-22 are invalid as a result of their divergence from the requirements of state law.

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[2] While the disability for convictions under Ohio Revised Code Chapter 2907 in Res. 99-15 had a five year limit as opposed to the three year time-frame as contained in Res. 00-22, Petitioner did not challenge the invalidity of the Res. 99-15 provision for failing to conform to the enabling statute because Union Township had "covered" this infirmity by including in Res. 99-15 the requirement that an application had to contain a statement that the persons named therein "*have never been*" convicted of or plead guilty to offenses under Ohio Revised Code Chapter 2907 or substantially equivalent laws. Res. 99-15(D)(5)(g) (Pet. App. 145). That provision was, however, deleted by way of the enactment of Res. 00-22. Moreover, for business reasons having nothing to do with legal standing issues, on September 17, 2004, the individual identified herein as John Doe II was elevated to be the lawful "manager" of the Petitioner limited liability company. Accordingly, he would be the proper person to sign the application for Deja Vu, and would be subject to all of the Resolution's requirements dealing with individuals "named on the application," including the civil disability provisions. But, as previously stated, under the enabling statute he disables the Petitioner from obtaining a license.

In light of the fact that the civil disability provisions of Res. 00-22 do not conform to the enabling statute, and as a result the conviction of John Doe II continues to preclude Deja Vu from obtaining a permit pursuant to the terms of that statutory scheme, Petitioner clearly then still has standing to challenge these disabling requirements, and its constitutional claims in this regard are not moot. Moreover, because the enabling statute applies to all townships throughout the State of Ohio, because it contains the draconian provision that a conviction under Ohio Rev. Code Chapter 2907 or a substantially similar law anywhere in the country effectuates a ***lifetime*** ban from being able to obtain a permit to engage in these forms of constitutionally protected expressive activities, and because Deja Vu challenged the constitutionality of the enabling statute from the outset of this litigation, this Court should grant the petition on this issue.

II. THE HOURS-OF-OPERATION RESTRICTIONS ARE UNCONSTITUTIONAL.

The Township argues that the hours-of-operation restrictions are not unconstitutional because the Petitioner can stay open as long as it wants so long as the entertainers wear at least pasties and G-stings. Opposition, pp. 9-10. This argument is unavailing for a number of reasons.

First, it is factually inaccurate. "Nudity" is defined in the Ordinance, in part, as the showing of the "buttocks with less than a fully opaque covering. . . . " Res. 00-22, § A(4)(a). Accordingly, performing in a G-string is still presenting "nudity" (as the buttocks would not be fully

covered), and the hours-of-operation restrictions still then apply.

Second, the Sixth Circuit, in its en banc ruling, does not make this distinction. It upholds ***closing*** requirements. It says nothing of the fact that if entertainers are performing in the nude during the day, but not at night, that the facility is not then a defined "Adult Cabaret" subject to all of the terms of the Ordinance.[3] In addition, a facial reading of Res. 00-22 does not necessarily provide such an interpretation.

Third, even if true, this still means that Deja Vu and the entertainers who perform in its establishment are not permitted to engage in the type of constitutionally protected entertainment activities that they desire to present during the restricted hours. And, from a constitutional perspective, there is, therefore, nothing to preclude Union Township or the State of Ohio from enacting a law limiting, for example, topless (or even G-string) dancing to only one hour of the day under this "interpretation."

It is in this regard that the Respondents are therefore in error when they contend that because Union Township could ban nude and topless dancing outright, it can therefore impose the hours-of-operation restrictions at issue. Opposition, pp. 8-9. The Township might have an argument if the "greater-includes-the-lesser" standard from *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986), was still good law. However, it is not.

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[3] *Cf.*, Pet. App. 109-110 (district court finding that the Ordinance is not unduly restrictive because entertainers can dance after midnight by putting on "minimal covering . . . ").

In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), this Court rejected *Posadas'* "greater-includes-the-lesser" concept as being "inconsistent with both logic and well-settled doctrine." *Id.* at 511. *See also id.* at 510-13, and cases cited therein. In disapproving Rhode Island's argument that because it had the power to ban the sale of liquor entirely it could then preclude advertisements of liquor prices, the majority observed that "[a]s the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive." *Id.* at 513. *See also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762-64 (1988) (four Justice majority rejecting a "greater-includes-the-lesser" argument as being a "legal slight-of-hand," and ruling that merely because the government had the right to totally preclude newsracks on public sidewalks, it did not have the right to require a license for the location of such devices which could be denied in the discretion of governmental officials).

Fourth, the argument of the Respondents is in conflict with their earlier contention – apparently accepted by the Sixth Circuit – that the reason that the Township exempted liquor establishments from the terms of Paragraph (M) (the hours-of-operation restrictions) was because it was without the power to regulate such establishments. *See* Pet. App. 23. Given this assertion, however, the pasties and G-string statement misses the mark.

Since the Respondents assert that the limitations as set forth in Paragraph (M) do not require *closure* of a business during the designated hours, but only modification of the form of entertainment presented therein, the Township could certainly command that all "adult cabarets," *including liquor establishments*, change their

entertainment at midnight as well. This would not effect the closing hours of liquor establishments at all,[4] and Union Township simply cannot have it both ways in these diametrically opposite arguments.

Finally, Respondents assert that the lower courts have "received ample guidance from this Court regarding the proper analysis of the hours of operation provision." Opposition, p. 10. But the only decision of this Court addressing hours-of-operation restrictions in the area of sexual expression is that of *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). That opinion imposed strict scrutiny and ruled that "hours" restrictions of erotic cable television were unconstitutional because there was a "significant restriction of communication, with a corresponding reduction in Playboy's revenues." *Id.* at 809.

Petitioner put on evidence to meet these standards (see petition at 8), but this did not sway the appellate court below. In addition, the other cases upholding these types of provisions – as are listed in both the petition and in the Opposition – obviously do not follow this Court's ruling in *Playboy*, and uphold a wide and varying array of

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[4] Moreover, the Ohio Liquor Code and Regulations only control the permissible hours for the *sale of intoxicating beverages*; not the times when liquor licensed establishments can be open or must be closed. Ohio Rev. Code § 4301.22; Ohio Admin. Code § 4301:1-1-49. In fact, the statute even acknowledges that it does not preclude local municipalities from adopting "a closing hour *for the sale of liquor*" earlier on Sunday than as set forth in the code. Ohio Rev. Code § 4301.22(C) (emphasis added).

such restrictions. Accordingly, further guidance from this Court is warranted.

CONCLUSION

For the reasons contained herein and in the petition, Deja Vu respectfully requests this Honorable Court to grant the writ.

December 2, 2005

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